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TECHNICAL FOUL: DAVID STERN'S EXCESSIVE USE OF RULE-MAKING AUTHORITY

BRENT D. SHOWALTER*

I. INTRODUCTION

In the past two seasons,¹ National Basketball Association (NBA) Commissioner David Stern has used some of his expansive authority in implementing a variety of rules designed to clean up the games, the players, and the image of the NBA. These rules include instituting a dress code for players² and various uniform requirements, using a new synthetic basketball, prohibiting players from attending certain nightclubs, and introducing a “point of emphasis” that players will be called for technical fouls for excessive complaining. Stern has implemented such rules under the auspices of the amount of authority he has been given in the Collective Bargaining Agreement (CBA) between the league and the National Basketball Players Association (NBPA) and in the NBA Constitution. However, the NBPA has begun to express its disagreement with Stern’s free flow of new rules and, in the future, may take action against these or other newly formulated rules.

This article will examine the scope of authority that David Stern and commissioners of other professional sports leagues have to formulate and implement player conduct rules similar to those Stern has recently instituted. In examining Stern’s authority, this article will discuss: (1) the history of the

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1. The NBA seasons of 2005-2006 and 2006-2007.
2. The dress code was discussed by the NBA and the National Basketball Players’ Association (NBPA), and supposedly agreed upon, during collective bargaining negotiations in the summer of 2005. See Mike Wise, *Opinions on the NBA’s Dress Code are Far from Uniform*, WASH. POST, Oct. 23, 2005, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/22/AR2005102201386_pf.html. However, since the dress code was not included in the final version of that collective bargaining agreement, it will be analyzed as if the NBPA did not consent to its institution.

professional sports league commissioner, including cases challenging a commissioner's authority, and the history of the NBA commissioner, (2) recent rules established by David Stern, (3) CBA provisions of the National Football League (NFL), Major League Baseball (MLB), National Hockey League (NHL), and NBA governing the creation of new rules, (4) whether player conduct rules must be collectively bargained between the league and the players' union under the National Labor Relations Act (NLRA), and (5) Stern's authority to institute new player conduct rules in light of the NBA CBA and the NLRA.

II. PROFESSIONAL SPORTS LEAGUE COMMISSIONER

Since the inception of the professional sports league commissioner position, the office has enjoyed a considerable amount of power over the league and its players. A commissioner is unique in the amount of authority he has been given, but the truly distinctive aspect of the position is that he makes many decisions based on his sole discretion and "represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners."³ A commissioner receives his authority to make decisions through the league's CBA, constitution, and bylaws,⁴ but these documents can also limit his authority.

A. History

The expansive authority possessed by professional sports league commissioners began when Judge Kenesaw Mountain Landis was elected as the first commissioner of a professional sports league in 1921.⁵ Judge Landis was elected as commissioner of MLB after the infamous Chicago Black Sox scandal,⁶ when the club owners decided that a one-person commissionership was necessary to "assure that public interests would first be served" and disgorge "existing evils" from baseball.⁷ To ensure that Landis was able to accomplish these goals, under the Major League Baseball Agreement he was given the power to "investigate, either upon complaint or upon his own

3. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach From a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995).

4. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 437 (2005).

5. *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited Oct. 24, 2007).

6. In the Black Sox scandal, eight Chicago White Sox players allegedly took payments from bettors to lose a game in the 1919 World Series. *Id.*

7. *Id.*

initiative, an act, transaction or practice, charged, alleged or suspected to be detrimental to the best interest of the national game of baseball, (and to determine and take) any remedial, preventive or punitive action (he deemed appropriate).”⁸ While this gave him considerable power, his power was magnified because the agreement also provided that his “decisions w[ere] final and could not be challenged by the clubs in court.”⁹

This expansive power first given to Landis has continued to this day in MLB, and commissioners of the other professional sports leagues enjoy similar authority. In MLB, the commissioner still has the authority to investigate and punish actions, by a fine or suspension, that are not in the best interests of baseball.¹⁰ In the NFL, the commissioner can fine, suspend, or terminate the contract of a player whose conduct is deemed “to be detrimental to the League or professional football.”¹¹ The commissioner of the NHL can expel, suspend, fine, or a combination thereof “any official or a Member Club or player or employee” for any act or conduct “whether during or outside the playing season [that] has been dishonorable, prejudicial to or against the welfare of the League or the game of hockey.”¹² The NBA commissioner’s authority includes the ability to discipline a player whose conduct at or during a game is “prejudicial to or against the best interests of the Association or the game of basketball” with a fine or suspension¹³ and to fine or suspend “any Player who, in his opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA].”¹⁴

B. Cases Challenging Commissioners’ Authority

The scope of a commissioner’s authority, mainly his authority to act in the best interests of the league or discipline a player for his conduct, has been judicially challenged, although courts generally provide deference to a commissioner’s decisions except where the commissioner acted beyond the scope of his authority or in bad faith.¹⁵

8. *Id.*

9. *Id.*

10. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE CONSTITUTION art. II, § 3 (2006), available at <http://www.businessofbaseball.com/docs/MLConstitutionJune2005Update.pdf>.

11. NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION Appendix C ¶ 15 (2006) [hereinafter NAT’L FOOTBALL LEAGUE CBA]; see also NAT’L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NFL art. 8.13(A) (rev. 1999).

12. NAT’L HOCKEY LEAGUE, NHL BYLAWS § 17.3(a) (1990).

13. NAT’L BASKETBALL ASS’N, NBA CONSTITUTION art. XXXV(d) (1989).

14. *Id.* art. XXXV(e).

15. MITTEN ET AL., *supra* note 4, at 437.

A commissioner's decisions made under the "best interests" of the game clause have been upheld for disapproving player trades¹⁶ and for suspending a Chief Executive Officer (CEO) of a club for one year due to his tampering with the exclusive negotiating rights of a free agent and his former club¹⁷ because the clause provides the commissioner with broad authority and discretion.¹⁸

However, even when acting under the "best interests" clause, a commissioner's authority is not unfettered. In the tampering case mentioned above, the commissioner also took away a draft choice from the club as a penalty.¹⁹ The court found that the commissioner did not have the authority to take away the draft choice because it was a penalty that the commissioner did not have the authority to impose for this type of conduct.²⁰ This was similar to *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*,²¹ where the court found that the NBA commissioner did not have the authority to deny a team a draft choice; only the NBA's board of directors had this power pursuant to the NBA's constitution.²² Similarly, a commissioner's assignment of a club to a different division under his "best interests" authority was invalid.²³ Although the best interests clause gave the commissioner broad authority, since the dispute was already governed by the constitution, the commissioner could not use his authority in contradiction of the constitution.²⁴

III. COMMISSIONERSHIP OF THE NBA

The NBA has had only four commissioners²⁵ since 1946, with each individual making his own distinct mark on the league.²⁶ These four commissioners, Maurice Podoloff, Walter Kennedy, Larry O'Brien, and David Stern,²⁷ all had a different impact on the NBA, possibly due to their use or

16. *Charles O. Finley & Co., v. Kuhn*, 569 F.2d 527, 531 (7th Cir. 1978).

17. *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977).

18. *Id.* at 1219-22; *Kuhn*, 569 F.2d at 534.

19. *Kuhn*, 432 F. Supp. at 1216-17.

20. *Id.* at 1223.

21. *Riko Enters. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).

22. *Id.* at 525.

23. *Chi. Nat'l League Ball Club, Inc. v. Vincent*, 1992 WL 179208 (N.D. Ill. 1992), *vacated*, *reprinted in* MITTEN ET AL., *supra* note 4, at 448.

24. *Id.*

25. Until 1967 the position was referred to as NBA President instead of NBA Commissioner. Mike Monroe, *The Commissioners*, NBA.COM, <http://www.nba.com/history/commissioners.html> (last visited Jan. 24, 2007). The NBA has had four presidents/commissioners. *See id.*

26. *Id.*

27. *Id.*

nonuse of authority. Recently, current NBA Commissioner David Stern has drawn attention to his use of authority by instituting a variety of player conduct rules.

A. NBA Commissioners

Maurice Podoloff became the first league commissioner²⁸ in 1946 when the NBA was known as the Basketball Association of America (BAA).²⁹ Unlike MLB Commissioner Kenesaw Mountain Landis, who had enjoyed expansive authority for over two decades, Podoloff had limited authority, yet he left his mark by successfully merging the BAA and the National Basketball League to create the NBA.³⁰ Podoloff led the NBA until 1963 when Walter Kennedy took over the position.³¹ Kennedy served as commissioner³² in 1964 when the NBPA was formed, and in 1971, the commissionership received expansive authority, similar to that of the MLB commissioner, when “the owners gave [Kennedy] far-reaching authority to run the league, making him perhaps the most powerful administrative figure in American pro sports at that time.”³³

Kennedy was succeeded as commissioner in 1975 by Larry O’Brien, whose accomplishments included a merger with the American Basketball Association and a landmark CBA in 1983.³⁴ In 1984, current commissioner David Stern took over the position. “Under Stern’s guidance the NBA has enjoyed its period of greatest growth and taken basketball to the forefront of the global sports scene.”³⁵ To accomplish this, Stern created the free agency system, presided over the CBA that brought the salary cap and revenue sharing to the NBA, developed NBA Properties and NBA Entertainment to market the NBA, and moved the NBA into new technological outlets.³⁶ He also expanded the league to thirty teams,³⁷ and under his watch, the average player

28. Podoloff’s official title was NBA President. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Kennedy’s title was changed from President to Commissioner in 1967. *Id.*

33. *Id.*

34. *Id.* The 1983 CBA was landmark because it established the first salary cap in professional sports, a revenue guarantee for players, and a substance abuse program. Dan T. Rosenbaum & Andy Stein, *Re-Negotiating the NBA Collective Bargaining Agreement*, Sept. 24, 2003, <http://www.uncg.edu/bae/people/rosenbaum/NBA/cba1.pdf>.

35. Monroe, *supra* note 25.

36. *Id.* Stern served as NBA Executive Vice President during the 1983 CBA negotiations that resulted in the salary cap and revenue guarantee. *Id.*

37. See Team Index, <http://www.nba.com/teams> (last visited Nov. 16, 2007).

salary rose from \$275,000 in 1983³⁸ to \$5.215 million in 2006.³⁹

B. David Stern's Player Conduct Rules

While Stern has grown the NBA into a successful, worldwide enterprise, his tenure has not been without controversy. During the past two seasons, Stern has instituted a variety of player conduct rules with the purpose of changing the NBA's image. These new rules include a player dress code, a new basketball, various uniform rules, technical fouls for excessive complaining, and a possible ban on certain nightclubs.

Stern instituted the player dress code⁴⁰ at the beginning of the 2005-2006 season⁴¹ to soften the NBA's hip-hop image and increase the league's appeal to its fans.⁴² The dress code requires players who are "engaged in team or league business" to dress in business casual attire.⁴³ Business casual attire is defined as a dress shirt or sweater with dress or khaki pants or dress jeans and appropriate shoes.⁴⁴ Players are not allowed to wear sneakers or sandals,⁴⁵ sleeveless shirts, shorts, jerseys, t-shirts, chains or pendants over clothing, sunglasses, or headphones.⁴⁶

The second major rule change was the institution of a new basketball for the 2006-2007 season.⁴⁷ The basketball was synthetic leather with a slightly different two-piece panel layout that was used in all NBA games.⁴⁸ The new basketball was a significant change due to the panel layout and the synthetic leather, and it was the first change in the NBA basketball in thirty-five years and only the second change in sixty years.⁴⁹ While the NBA claimed that the

38. Nat'l Basketball Ass'n Players Ass'n, *NBPA History*, <http://nbpa.com/history.php> (last visited Feb. 23, 2007).

39. Plunkett Research, Ltd., *Sports Industry Overview*, <http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx> (last visited Apr. 13, 2007).

40. *NBA Player Dress Code*, NBA.COM, http://www.nba.com/news/player_dress_code_051017.html (last visited Jan. 23, 2006).

41. *Proposed Dress Code Doesn't Suit Some NBA Players*, ESPN.COM, Oct. 5, 2005, <http://sports.espn.go.com/nba/news/story?id=2181671>.

42. Wise, *supra* note 2.

43. *NBA Player Dress Code*, *supra* note 40, § 1.

44. *Id.*

45. *Id.*

46. *Id.* § 3. A player can wear headphones in the locker room and on the team bus and plane. *Id.*

47. *NBA Introduces New Game Ball*, NBA.COM, June 28, 2006, http://www.nba.com/news/blackbox_060628.html. The old basketball was leather and was comprised of the traditional eight panels. *See id.*

48. *Id.*

49. *Id.*

ball improved shooting, scoring, and turnovers,⁵⁰ players complained that the ball stuck to their hands, did not bounce like the old ball,⁵¹ and cut their fingers.⁵² Due to these adverse effects, and because neither the NBPA nor the players were consulted before introduction of the ball, the NBPA filed an unfair labor practice charge⁵³ claiming that the ball adversely affected working conditions⁵⁴ and, therefore, could not be unilaterally implemented by Stern. Before the unfair labor practice charge could be litigated, and after less than a half season of use, the NBA pulled the new basketball and reverted back to the old leather basketball.⁵⁵

Also instituted for the 2006-2007 season were uniform rules and a point of emphasis.⁵⁶ The new uniform rules for the season are that players “can wear one 4-inch wristband on each wrist[, which] cannot be worn on the bicep, . . . headbands can be no wider than 2 inches, [and players] can no longer [wear] tights or long compression socks.”⁵⁷ Other uniform rules that are more strictly enforced and subject players to discipline for the season are that “players must keep their uniform shirts tucked into their pants” while they are on the court⁵⁸ and are prohibited from wearing rubber bands.⁵⁹ Additionally, the rule that “[p]layers, coaches and trainers are to stand and line up in a dignified posture along the sidelines or on the foul line during the playing of the National Anthem”⁶⁰ has been increasingly enforced as “players chewing gum and shifting as they stood in line [during the National Anthem] . . . ha[s] been outlawed.”⁶¹ In addition to these uniform rules, Stern also introduced a major

50. *NBA to Switch to Leather Ball on Jan. 1*, NBA.COM, Dec. 11, 2006, http://www.nba.com/news/ball_061211.html.

51. Michael S. Schmidt, *N.B.A. to Take up Complaints with Ball Manufacturer*, N.Y. TIMES, Dec. 5, 2006, available at <http://www.nytimes.com/2006/12/05/sports/basketball/06ball.html?ex=1172379600&en=026de53ab131da43&ei=5070>.

52. Brian Hanley, *Iverson Not the Answer for Bulls*, CHI. SUN-TIMES, Dec. 12, 2006, available at <http://www.suntimes.com/sports/basketball/bulls/168800,CST-SPT-bullInt12.article>.

53. Schmidt, *supra* note 51.

54. Mitch Lawrence, *Players Crying Foul*, N.Y. DAILY NEWS, Nov. 16, 2006, available at http://www.nydailynews.com/sports/2006/11/16/2006-11-16_players_crying_foul_nbas_new_ball_not_th.html.

55. *NBA to Switch to Leather Ball on Jan. 1*, *supra* note 50.

56. Oscar Dixon, *Stern Wants On-Court Decorum to be Uniform*, USA TODAY, Oct. 26, 2006, available at http://www.usatoday.com/sports/basketball/nba/2006-10-26-uniformity_x.htm?POE=SPOISVA.

57. *Id.*

58. NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NBA, available at http://www.nba.com/analysis/rules_h.html?nav=ArticleList (last visited Mar. 19, 2007).

59. Lawrence, *supra* note 54.

60. NAT'L BASKETBALL ASS'N, *supra* note 58.

61. Lawrence, *supra* note 54.

point of emphasis for the season in a new rule that “[p]layers will be called for technical[] [fouls] for excessive complaining.”⁶²

Finally, in January 2007, the NBA required its security forces to promulgate a list of nightclubs in all NBA cities that players should not visit.⁶³ Once such locations are identified, “the league will send a directive to teams mandating that players avoid those spots or be subject to a substantial fine.”⁶⁴

Like the directive of the nightclub ban, these player conduct rules have been seen as Stern’s directives and have raised controversy among the players, NBPA, media, and fans. The controversial nature of the rules has raised questions regarding Stern’s authority under the NBA CBA to institute such rules.

IV. PROFESSIONAL SPORTS LEAGUES’ PROVISIONS GOVERNING RULE CHANGES

David Stern and other professional sports league commissioners have broad authority under the “best interests” clause of a league’s CBA; however, a commissioner’s authority to institute new player conduct rules is limited under a league’s CBA, and he cannot unilaterally expand his power beyond that given to him.⁶⁵

A. Professional Sports Leagues’ CBA Provisions

Provisions in professional sports leagues’ CBAs governing the institution of new rules during the current term of the CBA vary significantly. One of the CBAs addresses only playing rules, while two cover most of the league’s rules and regulations, and another allows carte blanche institution of certain rules. The specificity and scope of these CBA provisions has an impact on the league’s commissioner’s authority to institute new player conduct rules.

i. NBA

The NBA commissioner has the broadest authority of the professional sports leagues, as the NBA CBA does not require the commissioner to get consent from the NBPA prior to enacting rules.⁶⁶ The NBA “is entitled to

62. Dixon, *supra* note 56.

63. Mitch Lawrence, *Indy’s Change of Pace*, N.Y. DAILY NEWS, Jan. 21, 2007, at 63. This mandate was in the wake of the murder of NFL player Darrent Williams at a Denver, Colorado, nightclub. *Id.*

64. *Id.*

65. See *infra* Part II.B.

66. See NAT’L BASKETBALL ASS’N, NBA COLLECTIVE BARGAINING AGREEMENT, art. VI § 12 (2005).

promulgate and enforce reasonable rules governing the conduct of players on the playing court” and must only give notice and consult with the NBPA prior to putting the rule into effect.⁶⁷ ““Conduct on the playing court’ [means] conduct in any area within an arena (including, but not limited to, locker rooms, vomitories, loading docks, and other back-of-house and underground areas, including those used by television production and other vehicles) at, during or in connection with an NBA . . . game.”⁶⁸ This includes “conduct engaged in by a player within an arena from the time the player arrives at the arena for an NBA game until the time the player has left the premises of the arena following the conclusion of such game.”⁶⁹ In regards to playing rules, the NBPA has a vote on the NBA Competition Committee, which recommends playing rules to the NBA’s board of directors for final approval.⁷⁰

ii. NFL

While the NBA’s CBA allows unregulated institution of certain rules, the NFL’s CBA only governs playing rule changes, and it limits the commissioner’s authority by requiring the NFL to give the National Football League Players Association (NFLPA) notice of all proposed changes.⁷¹ “If the NFLPA believes that the adoption of a playing rule change would adversely affect player safety,” it can call a meeting to discuss the rule change, and if it is unsatisfied with the outcome of the meeting, then it can “request an advisory decision by one of the arbitrators.”⁷² However, “[t]he arbitrator’s decision [is] advisory only, not final and binding.”⁷³ Therefore, once the arbitrator has made his decision, the NFL can implement the proposed playing rule change, even to the disagreement of the NFLPA.⁷⁴

iii. MLB

Unlike the NFL provision, MLB’s CBA provision governs playing rules, major league rules, and any other rules or regulations, limiting the

67. *Id.*

68. *Id.* art. XXXI § 8(c).

69. *Id.*

70. *Id.* art. XXIX § 4(a).

71. NAT’L FOOTBALL LEAGUE CBA, *supra* note 11, art. XIII § 1(c).

72. *Id.*

73. *Id.*

74. *See id.*

commissioner's authority to institute any type of rule.⁷⁵ If any playing or scoring rule change is proposed by MLB, it must give notice to the MLB Players Association (MLBPA).⁷⁶ The MLB and MLBPA must negotiate over the proposed rule change if the change would "significantly affect terms and conditions of employment."⁷⁷ If no agreement can be made on the rule change, the rule will "not be put into effect until the completion of the next complete succeeding season . . . following the date the change was proposed."⁷⁸

If the rule change involves "any Major League Rule, or other rule or regulation," MLB must give notice to the MLBPA and must negotiate the proposed change.⁷⁹ However, MLB's obligation to negotiate with the MLBPA applies only to changes of existing rules or regulations that would change a player benefit or rules that would "impose an obligation upon the Players which had not previously existed."⁸⁰

iv. NHL

Unlike the NBA commissioner's broad rule-making authority, the NHL commissioner's authority is the most restricted of the professional sports leagues' commissioners. The NHL's CBA provisions govern the amendment or modification of any league rule or playing rule,⁸¹ and any rule change by the NHL must be provided to the NHL Players' Association (NHLPA).⁸² If a proposed league rule or playing rule would "affect terms or conditions of employment of any Player" then the NHLPA must consent to the rule, which it cannot unreasonably withhold.⁸³ Additionally, the NHL must send the NHLPA the current league rules, and "[n]o Player shall be bound by any provision of a League Rule that has not been furnished to the NHLPA."⁸⁴

75. MAJOR LEAGUE BASEBALL, 2003-2006 BASIC AGREEMENT art. XVIII (2002).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. NAT'L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NHL AND NHL PLAYERS' ASSOCIATION art. 30.3 (2005).

82. *Id.* (governing league rules); *Id.* art. 30.2 (governing playing rules).

83. *Id.* art. 30.3.

84. *Id.* art. 30.1.

B. Commissioner's Authority to Institute Player Conduct Rules Under the CBA

To institute new player conduct rules, a commissioner must have the authority under the CBA provisions. If he is not given the explicit authority in the CBA, he may still be able to unilaterally implement such rules without the consent of the players' union under certain conditions.⁸⁵ Each of the four professional sports leagues' CBAs have significantly different provisions governing the institution of new rules, and therefore, the authority of each commissioner to institute player conduct rules, such as those created by the NBA, also varies significantly. The authority of each league's commissioner to institute new player conduct rules will be analyzed based on the rules instituted by David Stern.

i. NBA

The NBA's CBA provides Commissioner Stern with the most rule-making authority of the professional sports league commissioners. The CBA gives Stern broad authority to institute rules "governing the conduct of players on the playing court."⁸⁶ Conduct on the playing court "mean[s] conduct in any area within an arena . . . from the time the player arrives . . . until the time the player [leaves]."⁸⁷ While this gives Stern considerable authority, he still should not be able to ban players from attending certain nightclubs or institute the new basketball. The prohibition on players attending nightclubs does not govern the conduct of players while they are within an arena; likewise, the new basketball should not be considered "conduct of players." Similarly, the dress code cannot be implemented by Stern, as its scope is too broad. The dress code would be within the scope of the clause if it regulated players' attire only when they were in an arena. However, the dress code requires "[b]usiness Casual attire whenever [players] are engaged in team or league business."⁸⁸ This requires certain attire even when players are outside an arena, which falls outside the scope of the CBA. Finally, the uniform rules and technical fouls for excessive complaining would be within the scope of the provision as they regulate the conduct of players on the playing court.

85. Rules could be implemented by the commissioner if they do not relate to "wages, hours, and other terms and conditions of employment. . . ." Nat'l Labor Relations Act, 29 U.S.C. § 158(d) (1994). See *infra* Part V for a complete discussion.

86. NAT'L BASKETBALL ASS'N, *supra* note 66, art. VI § 12.

87. *Id.* art. XXXI § 8(c).

88. *NBA Player Dress Code*, *supra* note 40.

ii. NFL

Unlike Stern's broad authority, the NFL's CBA governs only changes to playing rules, which limits the commissioner's authority to implement new rules.⁸⁹ The NFL commissioner must give notice of playing rule changes to the NFLPA and may have to discuss the changes with them, but he can ultimately institute these playing rules without the NFLPA's consent. He cannot, however, institute other types of rules.

Playing rules are rules that govern the administration of the game itself,⁹⁰ such as the descriptions of the playing field, duties of the officials, penalties that may be assessed, timing, and other rules governing how the game is to be played.⁹¹ The majority of the rules instituted by the NBA—the dress code, the nightclub ban, the new ball, and the uniform rules—would likely not be considered playing rules, and thus, would not be permissible under the NFL CBA.

The dress code and nightclub ban are not playing rules as they govern conduct outside of the game. A new ball and uniform rules would also not be considered playing rules. While both could be considered rules governing the administration of the game, because the NFL's current playing rules do not address the design of the ball nor uniform requirements,⁹² the NFL, and likely an arbitrator or judge, would not consider them playing rules. Only one rule, the penalty for excessive complaining, would be considered a playing rule because it involves administration of the game and is a penalty similar to those found in the NFL rulebook.⁹³

iii. MLB

MLB's CBA is much broader than the NFL's CBA. Not only does it govern playing rules, but it also governs most other rules and regulations of the league.⁹⁴ Under the MLB CBA, the commissioner would only have the authority to unilaterally implement playing rules, as other rules and regulations

89. NAT'L FOOTBALL LEAGUE CBA, *supra* note 11, art. XIII § 1(c).

90. See MAJOR LEAGUE BASEBALL, OFFICIAL RULES (2006), available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp. "This code of rules is written to govern the playing of baseball games." *Id.*

91. See *id.*; NAT'L FOOTBALL LEAGUE, DIGEST OF RULES, available at <http://www.nfl.com/rulebook/digestofrules> (last visited Mar. 19, 2007).

92. *Id.* These rules include a section on the ball; however, it sets forth the number of balls needed for a game and the administration of ball use. *Id.* It does not include rules governing the ball itself.

93. See *id.*

94. MAJOR LEAGUE BASEBALL, *supra* note 75, art. XVIII.

must be negotiated with the MLBPA.⁹⁵ Similar to the NFL, the penalty for excessive complaining would be considered a playing rule, while the dress code and nightclub ban would not be playing rules. However, contrary to the NFL, a new ball and uniform rules should be considered playing rules because they concern the playing of the game and are currently included in the MLB rulebook.⁹⁶

Under the MLB CBA, any other rule changes, if they altered a player benefit or introduced a new obligation on a player, could not be instituted by the commissioner, as they must be negotiated with the MLBPA.⁹⁷ Under these criteria, the commissioner could not institute the dress code or the ban on certain nightclubs, as they would impose new obligations on a player that had not previously existed under the CBA.

iv. NHL

Contrary to Stern's broad authority, the NHL's CBA significantly limits the commissioner's rule-making authority. The CBA provisions govern playing and league rules and do not allow the commissioner to institute any rule that "affect[s] terms or conditions of employment of any Player," without the consent of the NHLPA.⁹⁸ This limitation effectively provides the commissioner with no significant rule-making authority because, under the NLRA, the league must collectively bargain with the NHLPA over "wages, hours, and other terms and conditions of employment."⁹⁹

V. NATIONAL LABOR RELATIONS ACT

Even where a commissioner does not have authority under the CBA to institute a certain player conduct rule, he may still unilaterally implement the rule if it does not affect the players' "wages, hours, and other terms and conditions of employment."¹⁰⁰

The NLRA governs employer-employee relations,¹⁰¹ and it gives employees the right to form labor organizations to collectively bargain with

95. *Id.* Playing rules must be negotiated with the MLBPA but if the two parties cannot reach an agreement, the rule can be instituted by MLB the following year. *Id.*

96. *See* MAJOR LEAGUE BASEBALL, OFFICIAL RULES §§ 1.09, 1.11 (2006), *available at* http://mlb.mlb.com/mlb/downloads/y2007/01_objectives_of_the_game.pdf.

97. MAJOR LEAGUE BASEBALL, *supra* note 75, art. XVIII.

98. NAT'L HOCKEY LEAUGE, *supra* note 81, art. 30.3.

99. Nat'l Labor Relations Act, 29 U.S.C. § 158(d) (1994).

100. *Id.*

101. *Id.* §§ 151–169.

their employers.¹⁰² Because players in professional sports leagues have formed unions to collectively bargain with their respective leagues, the NLRA governs the bargaining relationship between the two parties. In the collective bargaining relationship, “to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment.”¹⁰³

“[W]ages, hours, and other terms and conditions of employment”¹⁰⁴ are considered mandatory subjects of collective bargaining that must, at the insistence of either party, be bargained for between the employer and the union.¹⁰⁵ Those subjects not comprising one of these areas are permissive subjects that need not be bargained over.¹⁰⁶ Failure or refusal by a party to negotiate with regards to a mandatory subject, such as an employer unilaterally implementing a mandatory subject, constitutes a violation of the duty to collectively bargain and is an unfair labor practice.¹⁰⁷

However, what constitutes a mandatory subject of bargaining is sometimes not clear. “[G]eneral[ly], ‘only issues that settle an aspect of the relationship between the employer and employees’ are mandatory subjects of bargaining. An issue arising from outside the bargaining unit may be a mandatory subject . . . if it ‘vitally affects’ the terms and conditions of employment within the bargaining unit.”¹⁰⁸ Even if a decision by an employer has an adverse effect on employees, if the decision is one about “the scope or direction of an enterprise,” it will not be considered a mandatory subject.¹⁰⁹ If the subject is not a mandatory one, then it is considered permissive and may be implemented by the employer without being presented to the union, regardless of whether the subject was included in the CBA.¹¹⁰

102. *Id.* § 157; Brent Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 654 (2007).

103. Nat’l Labor Relations Act § 158(d).

104. *Id.*

105. *Id.*

106. John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players from Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507, 542 (2005).

107. *See* NLRB v. Katz, 369 U.S. 736, 743 (1962).

108. *Pall Corp. v. NLRB*, 275 F.3d 116, 119-20 (D.C. Cir. 2002) (quoting *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178-79 (1971)).

109. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 673 (1981).

110. Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 446-47 (2002).

A. Employer Rules as a Mandatory Subject of Collective Bargaining

Whether a rule instituted by an employer is a mandatory subject of collective bargaining, especially on the grounds that the rule affects “other terms and conditions of employment,”¹¹¹ is often unclear because the NLRA does not specifically define these terms. Generally, instituting new rules that could result in employee discipline, such as rules on absenteeism and tardiness,¹¹² or procedural and safety rules¹¹³ affect the terms and conditions of employment, and thus, must be bargained over.

In *Murphy Diesel Co. v. NLRB*,¹¹⁴ the employer unilaterally modified and implemented rules on absenteeism and tardiness.¹¹⁵ The employer refused to bargain over the rules¹¹⁶ because the CBA between the employer and the union contained a clause stating that “all management functions are reserved to the Company,” and the CBA did not address the rules in question.¹¹⁷ The employer also claimed that the rules were not new because they were merely a clarification of its previous rules.¹¹⁸ The court found that these rules were conditions of employment, and thus, mandatory subjects of bargaining.¹¹⁹ They were more than a clarification of existing rules, and the clause in the CBA did not give the employer authority to institute the rules.¹²⁰ The CBA “ma[de] no reference to rules on absence or tardiness. Any waiver of the Union’s right to bargain about conditions of employment must be ‘clear and unmistakable.’”¹²¹

Similarly, new plant rules issued by Miller Brewing in *NLRB v. Miller Brewing Co.*¹²² were considered conditions of employment and thus subject to bargaining.¹²³ Although the booklet of plant rules issued by Miller Brewing mainly contained rules that were already known and in force, which did not need to be bargained over, it did contain at least two new rules that required

111. Nat’l Labor Relations Act, 29 U.S.C. § 158(d) (1994).

112. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 304 (7th Cir. 1971).

113. *See NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

114. 454 F.2d 303 (7th Cir. 1971).

115. *Id.* at 304.

116. *Id.* at 306.

117. *Id.* at 304 (quoting CBA).

118. *Id.* at 306.

119. *Id.* at 307.

120. *Id.* Clarification of existing rules usually need not be bargained over. *See id.* at 306-07.

121. *Id.* (quoting *Gen. Elec. Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969)).

122. *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969)

123. *Id.* at 15.

bargaining.¹²⁴ Furthermore, even though the union had not previously objected to the unilateral implementation of plant rules, such a waiver did not bar the union from challenging future rules.¹²⁵ "Each time the bargainable incident occurs—each time new rules are issued—Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent 'close-out'"¹²⁶

B. Equipment as a Mandatory Subject of Collective Bargaining

In addition to new rules, equipment or machinery may also be considered to affect the conditions of employment. In *National Football League Management Council*,¹²⁷ the NFLPA demanded that the NFL Management Council collectively bargain over future installations of artificial turf at NFL stadiums.¹²⁸ When the management council declined, claiming that it was not required to bargain on that subject, the NFLPA filed suit alleging that installation of artificial turf was a mandatory subject of collective bargaining.¹²⁹ The National Labor Relations Board found that artificial turf was a mandatory subject, and therefore, the management council "was obligated to meet and confer with the Union on this matter."¹³⁰

C. Commissioner's Authority to Institute Player Conduct Rules under the NLRA

A commissioner would have the authority to institute rules such as a dress code, a new ball, a nightclub ban, uniform rules, and a penalty for excessive complaining only if he was given the authority in the league's CBA or if the rule was a permissive subject of collective bargaining. Of these rules, only the uniform rules and the penalty for excessive complaining would likely be considered permissive. The remaining rules would be considered conditions of employment, and therefore, would be mandatory subjects that must be collectively bargained.

The institution of a new ball, similar to the artificial turf in *National Football League Management Council*, is a mandatory subject of collective bargaining. Although the court did not explain the reasoning behind its

124. *Id.* at 15-16.

125. *Id.* at 15.

126. *Id.*

127. NFL Mgmt. Council, 203 N.L.R.B. 958 (1973).

128. *Id.*

129. *Id.* at 958-59.

130. *Id.* at 959.

decision that artificial turf was a mandatory subject, installing turf would likely affect the conditions of employment because it is fundamental to the players performing their jobs and could affect their health and safety. Similarly, a new ball is such an integral part of players' jobs that changing the ball would affect their working conditions, such as the new basketball instituted by the NBA did, cutting the players' fingers and affecting their shooting and dribbling.

The nightclub ban and dress code are also mandatory subjects that must be bargained for because they affect a player's terms and conditions of employment. The nightclub ban affects the terms and conditions of a player's employment because a player is not allowed to visit those banned nightclubs without the risk of getting penalized with a substantial fine.¹³¹ This new rule infringes into the players' personal lives outside of their employment as professional athletes and subjects them to discipline if they violate the rule, materially altering their conditions of employment. Similarly, the dress code also affects conditions of employment. Before the dress code, players could wear any attire of their choosing.¹³² The dress code changed this by requiring the players to wear business casual attire to, from, and inside the arena, thereby substantially altering a condition under which the players were employed.

The uniform rules and the penalty for excessive complaining could follow similar logic as that of the dress code in that they alter a condition of employment; however, both rules are likely permissive subjects of bargaining. First, both rules could be considered clarifications of existing rules, as opposed to new rules, and therefore are not mandatory subjects. The rule on excessive complaining is a clarification of the rule that officials are permitted to assess technical fouls "at any time."¹³³ The uniform rules could be a clarification of the existing uniform rules, including the rule that players must be uniformly dressed.¹³⁴ Some of these uniform rules, such as players keeping their uniforms tucked in and standing in line during the National Anthem, are not new rules at all, but are existing rules that are being more strictly enforced. Additionally, the uniform rules that are new, such as those regulating headbands, wristbands, and compression shorts, even if they are not considered clarifications, do not affect the conditions of a player's employment, as they are very small and have no affect on a player performing his job functions.

131. Lawrence, *supra* note 63.

132. Players' attire was subject to individual team rules.

133. NAT'L BASKETBALL ASS'N, *supra* note 58, Rule No. 12A § V(a).

134. *Id.*

VI. DAVID STERN'S RULE-MAKING AUTHORITY

Under the NBA CBA, David Stern has the authority to establish rules governing the conduct of players while they are on the playing court.¹³⁵ Under this authority, Stern can likely institute the uniform rules and assess technical fouls for excessive complaining.¹³⁶ He cannot, however, institute the new basketball, the nightclub ban, or the dress code because these rules either govern players' conduct outside the playing court or do not involve the conduct of players.

For Stern to be able to institute these three rules that fall outside the scope of his authority under the CBA, they must be considered permissive subjects of collective bargaining. If the rule changes are deemed mandatory subjects, then Stern can institute them only if the NBPA consents to their institution. Similar to his authority under the CBA, Stern would have the authority to unilaterally implement the uniform rules and assess technical fouls for excessive complaining, as they are likely permissive subjects of bargaining.¹³⁷ The new basketball, nightclub ban, and dress code, however, would likely be considered mandatory subjects of collective bargaining, and therefore, Stern does not have the authority to institute them without the consent of the NBPA.

The NBPA could bring, and would likely be successful on, unfair labor practice charges against Stern because he has not bargained over the rules, choosing instead to unilaterally implement them. Even though the NBPA may have not have formally objected to these rules, under *Murphy*, it has not waived its rights to bargain over them unless it gave clear and unmistakable consent.¹³⁸ Furthermore, even though the NBPA has not objected to the unilateral implementation of these rules or previous rules, it can still require collective bargaining over these or future rules because "[e]ach time the bargainable incident occurs—each time new rules are issued—Union has the election of requesting negotiations or not."¹³⁹

VII. CONCLUSION

NBA Commissioner David Stern does have expansive authority, which has been given to him under the CBA and the NBA's Constitution. Recently, he has seemingly tested the limits of his authority through implementing a variety of player conduct rules in an effort to improve the league's image.

135. NAT'L BASKETBALL ASS'N, *supra* note 66, art. VI § 12.

136. *See infra* Part IV.B.4.

137. *See infra* Part V.C.

138. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 307 (7th Cir. 1971).

139. *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

Stern's intentions in instituting such rules may or may not be laudable, but he has continued the barrage of rules, much to the disagreement of the NBPA. On the other hand, the NBPA has been hesitant to take any action against these rules due to the possible bad publicity of multi-million dollar athletes complaining about having to dress in business casual attire or use a different basketball, the expense in pursuing claims, and the questionable outcomes.

While Stern may not have the authority to institute some of the rules under the CBA's provision giving him the power to institute rules governing players' on-court conduct, and some of the rules may be considered mandatory subjects of collective bargaining, his actions could have a more serious effect than the issue of whether he does or does not have the authority to undertake such actions. That effect could be felt in 2011 when the current CBA expires¹⁴⁰ and the NBPA insists on taking away some of the commissioner's rule-making authority. It is possible that from now until 2011 Stern will not institute any new, attention-getting rules and the NBPA will forget about his recent actions. However, it is equally as possible that he will continue to implement player conduct rules to the disagreement of the NBPA and it will not forget about his use of authority. "[A] league commissioner does not have unfettered independence or authority. . . . [A]t times, he or she must walk a tightrope to avoid undermining or losing his or her authority."¹⁴¹ David Stern is walking a tightrope with his player conduct rules and is in danger of losing his authority.

140. NAT'L BASKETBALL ASS'N, *supra* note 66, art. XXXIX § 1. The current CBA runs through June 30, 2011, and the NBA has a one-year option to extend it through June 30, 2012. *Id.* art. XXXIX §§ 1-2.

141. MITTEN ET AL., *supra* note 4, at 437.

